No. 13669.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

W. W. SHEPHERD and NORMA D. SHEPHERD, Co-partners, Doing Business as Shepherd Tractor & Equipment Co.,

Appellants,

vs.

CONSTRUCTORA, S. A., a Corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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Comment.

It is correct for appellee to say that it offered into evidence Exhibit 1, the same consisting of the file of the Third party claim suit in the State Court. Appellant objected to its admission on the ground that

> "it appears on the face of the pleadings contained in the claim that the court had no jurisdiction" [Tr. pp. 36-37.]

The Judgment of the State Court Was Open to Attack.

Appellee questions, because a default of judgment was involved in the case of *Thompson v. Cook,* 20 Cal. 2d 564, cited by appellant, as authority for the rule that when parties admit what the facts that establish lack of jurisdiction of a court rendering a judgment, that the same is void as if shown by the record.

We refer the court to similar holdings in other cases, a default judgment not being involved.

> "We dismiss appellant's objection, that respondent may not attack a judgment, regular on its face, by citing the former decisions of this court to the effect that the rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. But if the parties admit the facts which show that the judgment is void, or if they are established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where the judgment is void upon its face."
>
> *Akley v. Bassett,* 189 Cal. 625, 639.

> "When the attack which the defendant makes upon said decree is not only not resisted as collateral but when the facts upon which it relies to establish that the decree is void are expressly admitted by the party relying upon such decree and also expressly permitted to be introduced in evidence without objection, his present objection that the attack is collateral must be held to have been waived, and if, as a matter of law, the decree upon the admitted facts is void, it is the duty of the court to so declare."
>
> *Follette v. Pacific Light and Power Corporation,* 189 Cal. 193, 205.

"These cases establish the rule that, although a judgment cannot be collaterally attacked because of lack of service, if that fact is stipulated to, the judgment must be read as if that fact appeared on the face of the judgment. In such event the judgment is then void on its face."

Estate of John Ivory, 37 Cal. App. 2d 22, 31.

"However, a judgment void for lack of jurisdiction of the subject matter is equally subject to collateral attack when that fact appears on the face of the judgment roll. (Capital Bond & Investment Co. v. Hood, 218 Cal. 729 [24 P. (2d) 765], and equally subject to the rule as quoted in Thompson v. Cook, *supra,* from Hill v. City Cab, etc. Co., 79 Cal. 188, 191 [21 Pac. 728]):

"If the party, however, should admit the facts which show the judgment to be void . . . then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face."

San Francisco Unified School District v. City and County of San Francisco, 54 Cal. App. 2d 105, 111-112.

Pleadings. Appellee argues that appellant has not pled in its answer as a defense that the state court judgment was void for lack of jurisdiction. This need not be determined as appellee stipulated that included in the issues herein was whether the state court had jurisdiction to determine the Third party claim. [Tr. pp. 21-22.]

Estoppel. The Third party claim proceeding was inaugurated not by appellant, but by appellee when it filed with the sheriff its third party claim. As there were no

fruits under the state court judgment, appellant is not estopped to attack the judgment on the theory that it accepted the fruits thereof.

Pleadings, Appellee's Lack Thereof, Respecting Ownership of Motorgrader.

Appellant does not attack the sufficiency of the pleadings of appellee. It has merely pointed out that the only allegations in the complaint of appellee, respecting ownership of the motorgrader, are based on its allegations respecting the judgment of the state court declaring appellee to be sole owner. Had appellee set forth in his complaint an unqualified allegation respecting its alleged title and ownership of the motorgrader, it would have been entitled to offer evidence in support thereof, independently of the judgment of the state court which appellant attacked at the trial and on this appeal.

Damages.

It is submitted that the rule of damages for loss of use of an automobile, as contended for by appellee, is not applicable to the instant case. We are here dealing with a motorgrader, which is a specialized type of earth moving equipment. It may not be said that the demand for the rental of such equipment is comparable to the demand for an automobile. In the absence of evidence establishing such a demand for a motorgrader, it would be improper for the court to indulge in the conclusion that a motorgrader is capable of being put to use on a basis comparable to that of an automobile, hence, the point of appellant presented in its opening brief is well taken that damages for loss of use are not recoverable in the absence of showing that the motorgrader would have been in use during the period of deprivation.

State Court's Lack of Jurisdiction to Try Title to Motorgrader.

Since the filing of appellant's opening brief herein, there has been lodged with the court a supplemental Transcript of Record, the same consisting of the opinion of the trial judge herein.

The interpretation placed on Section 689, Code of Civil Procedure, by the reviewing courts of California indicate that the remedial provisions thereof are available only in instances where the type of levying by the sheriff is such that the property comes in his possession and custody. The following cases illustrate the foregoing.

> "The effect of the appeal is to leave this question of title suspended and in the same condition as it was in before trial. The sheriff accordingly holds the property which he seized under a writ of execution subject to the third party claim. If he sells the property before title is finally determined he sells at his own risk. Section 689 gives the judgment creditor the privilege of relieving the sheriff of that risk by posting a bond to indemnify him, and the section makes it plain that it is only when such undertaking is given that the sheriff is required to hold the property."
>
> *Fulton v. Webb*, 9 Cal. 2d 726, 729.

> "Third party claim proceedings under Section 689 of the Code of Civil Procedure are had for the purpose of determining whether the debtor has any right, title or interest in the property upon which the levy has been made. By the terms of that section, the judgment of the court in such proceedings is only made 'conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have

said property taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment.' "

Deevy v. Lewis, 54 Cal. App. 2d 24, 29.

The cases cited by appellant in support of its argument that Section 689, Code of Civil Procedure, may not be invoked where the levy was by way of garnishment are criticized because only debts or corporate stock were the subject of said decisions, excepting the Kinslow case.

The primary and present purpose of Section 689, Code of Civil Procedure, is to give protection to the sheriff levying a writ of attachment against claims for damages by third persons. It is clearly held in the citation submitted by appellant in the case of *Bank of America v. Riggs,* 39 Cal. App. 2d 679, 683, that damages against a sheriff could not accrue unless the movables levied on him were in his physical custody by seizure and detention. We submit that such ruling remains unimpaired notwithstanding the amendment of the statute.

In the Kinslow case the court discussed the provisions of Section 689, Code of Civil Procedure, and held that where personal property is levied upon by the sheriff, the right accrues to a third person claiming such property to assert his claim and, omitting so to do, according to the terms of the section, the officer making the levy is not liable to him in damages. The court expressly approves the decision in the case of *Sunset Realty Co. v. Dadmun,* 34 Cal. App. 2d (Supp.) 733, 88 Pac. 2d 943.

In the latter case the court said:

"In the Kinslow case, the expressions 'taking or keeping such property' and 'holding . . . such property' were said to be 'not pertinent to any acts of an officer levying execution upon real property. He neither takes, keeps nor holds real property after a levy thereon.' We now have not only these, but other expressions: 'seizing, taking, withholding or sale of such property'; 'the taking, keeping or sale of such property'; 'such officer shall hold the property'; 'right to have said property taken, or held, by the officer.' In this connection, we quote from *Herrlich v Kaufmann, supra,* 99 Cal. 271, 274; because of the words we emphasize: 'Formerly, assets of a judgment debtor, *which could not be effectively seized by the sheriff under an execution, such as a debt* owing to the defendant, could be reached, upon a proper showing, through a court of equity by means of a creditors' bill or suit,' and adopting the thought of the Supreme Court in the *Kinslow* case, we say: the expressions we have just quoted from Section 689 are not pertinent to any acts of an officer garnisheeing a debt. He neither seizes, takes, holds, withholds, keeps or sells the debt. Nowhere in Section 689, Code of Civil Procedure, do we find any language indicating that it had any reason to be or was intended to be applied when a debt had been subjected to garnishment."

Sunset Realty Co. v. Dadmun, 34 Cal. pp. 2d (Supp.) 733, 741-742.

We submit that the reasoning of the opinion in the last quoted case is equally applicable whether the subject of the garnishment was a debt or other type of personal property in the hands of a third person.

All doubt from the controversy would be removed if it was determined that Belyea was the agent of defendant, as subsection 3 of Section 542, Code of Civil Procedure, would apply, as the same provides that personal property capable of manual delivery, in the possession of the defendant, must be attached by taking the same into custody. Assuming that Belyea was the agent or bailee of appellee, we submit that there is no justification for the trial court's conclusion that, "Obviously, Belyea would not therefore turn the grader over to Constructora." [Supp. Tr. p. 77.] Conceivably, an arrangement might have been made with Belyea by appellee whereby in consideration of an indemnity agreement the motorgrader could have been put in active use in Los Angeles County, thus minimizing damages, or even permitting the removal thereof to Mexico. On the question of minimizing damages, the omission of Belyea to file its answer to the garnishment prior to August 4, 1949, or to notify appellee more promptly of the levy of the garnishment should not be charged to appellant. After all, no notice was acquired by appellant, respecting the appellee's interest in the motorgrader, until the filing of the third party claim on May 9, 1949. Appellant should not suffer because of the derelictions of appellee or its agent. Sec. 3543, Civil Code of California. Within twenty-four (24) hours after re-

ceiving notice of appellee's asserted interest it notified the sheriff that no indemnity bond was to be posted. Had application been made by appellee the restraining order might have been modified to require a bond if the showing so justified same. But appellee made no such motion or took any other steps to mitigate its claimed damage. We submit that these facts warrant consideration by this Honorable Court in passing on that phase of the case relating to damages.

Appellant submits that the judgment should be reversed.

WILLIAM K. YOUNG,

Attorney for Appellant.